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Decision 05-06-030 June 16, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utilisource, fka Eastern Pacific Energy, Inc., a California Corporation, Complainant, vs. Southern California Edison Company, Defendant.	Case 04-05-014 (Filed May 10, 2004)

Robert L Esensten, Attorney at Law, for Utilisource, fka Eastern Pacific Energy, Inc., a California Corporation, complainant.
Michael J. Barrett, for Southern California Edison Company, defendant.

DECISION DENYING COMPLAINT

TABLE OF CONTENTS

DECISION DENYING COMPLAINT

I. Summary

Utilisource, fka Eastern Pacific Energy, Inc. (Utilisource), is an electric service provider (ESP). Utilisource filed this complaint against Southern California Edison Company (Edison) seeking an order finding Utilisource to be entitled, as of October 2002, to provide electric power to certain affected customers that had valid contracts prior to September 20, 2001.[1] We deny the requested relief. We conclude that Utilisource has breached its obligation to comply with all applicable laws, tariffs, and Commission requirements.

II. Procedural Background

In October 2002, Utilisource requested that Edison put 674 of Utilisource's customers on direct access.[2] Edison denied this request because Utilisource did not comply with the October 5 and November 1, 2001 deadlines, as required by Rule 1 adopted in D.02-03-055.

Prior to filing this case at the Commission, Utilisource filed a similar complaint in the Los Angeles Superior Court as Case No. GC 032420. However,

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[1] As amended by its testimony and brief, we interpret Utilisource's complaint as seeking to provide electric power to customers with whom Utilisource had valid contracts before September 20, 2001, but for whom neither Utilisource nor the customer had filed a direct access service request (affected customers). Customers who had direct access on or prior to September 20, 2001, but who became bundled customers on or before September 20, 2001, cannot return to direct access after September 20, 2001. (See Decision (D.) 02-03-055, 2002 Cal. PUC LEXIS 195 * 33, Exhibit (Ex.) 14-26.)

[2] Since October 2002, Utilisource has twice increased its number of such customers, to 800 in its complaint, then to 2,649 in its testimony.

the court sustained Edison's demurrer with leave to amend, giving Utilisource 16 months to allege that it has exhausted its administrative remedies, citing Edison's Electric Tariff Rule 22.B.17.c. The court's minute order stated it believed that the Commission has the initial jurisdiction to resolve the dispute. The court recognized that Pub. Util. Code § 1701.2(d) requires that adjudication matters generally be resolved within 12 months and therefore gave Utilisource sufficient time to initiate and adjudicate the matter before the Commission.

On May 10, 2004, Utilisource filed this complaint at the Commission. The complaint also initially sought an order directing Edison to pay all lost profits to Utilisource for Edison's failure to provide electric power to these customers. Recognizing that the Commission cannot award damages, Utilisource has abandoned this request for relief before this Commission, but has indicated it will seek such damages in Superior Court.

Evidentiary hearings were held in Los Angeles, California on October 25 and 26, 2004, and the case was submitted with the filing of the reply briefs on December 17, 2004.

III. Direct Access and the 2000 - 2001 Energy Crisis

To provide context, a summary of certain aspects of direct access and the 2000 - 2001 state energy crisis is useful. Initially, in California's restructured energy market, any customer from Edison, Pacific Gas and Electric Company (PG&E) or San Diego Gas & Electric Company's (SDG&E) service areas could subscribe to "bundled service" from a utility (in this case, Edison) or "direct access" service from an ESP. Customers who purchased bundled service from Edison paid an energy charge to cover Edison's power supply costs. A bundled service customer's total bundled bill included charges for all utility services, including distribution, transmission, and energy charges. A direct access

customer received distribution and transmission service from the utility, but purchased its electric energy from its ESP. A utility's bundled customer could choose to become a direct access customer and later revert to bundled service, because the utility was the electricity provider of last resort.

With the extraordinary increases in energy prices beginning in mid-2000, 2001, events caused a radical change in direct access. On January 17, 2001, the Governor proclaimed that an emergency existed in the California electricity market that threatened the solvency of California's major public utilities. On February 1, 2001, the Governor signed Assembly Bill (AB) 1X, which directed that direct access be suspended on a date set by the Commission. On September 20, 2001, the Commission issued D.01-09-060 which suspended the right of customers to enter into direct access contracts after September 20, 2001. (See D.01-09-060, 2001 Cal. PUC LEXIS 846, Ex. 8.) In that decision, the Commission also stated that the effect to be given to contracts executed or agreements entered into before September 20, 2001, would be addressed in a subsequent decision.

D.01-09-060 gave further direction to the utilities to take steps to ensure that, among other things, the utilities only accept direct access service requests (DASRs)[3] for contracts executed on or by September 20, 2001:

[3] The method by which a utility distribution company, in this case Edison, is notified that one of its customers desires ESP service or desires to return to bundled service is when the ESP (usually) or the customer (rarely) files a DASR with the serving utility. Similarly, a DASR is required to inform the utility that a contract has been assigned, or renegotiated, or terminated or extended, or has had additional locations incorporated.

> "We direct … the utilities not to accept any … DASRs for any contracts executed [on] or agreements entered into after the effective date of this decision. Steps that the utilities might take to ensure compliance with this order may include obtaining from each energy service provider a list of relevant identifying information for those customers that have entered into timely contracts, but for whom DASRs have not been submitted. We direct the utilities to revise any information disseminated to customers that describes direct access to explain that direct access service has been suspended. The utilities should submit these revisions to the Public Advisor's office and the Energy Division for review. Within 14 days of the effective date of this decision, each utility should inform the Director of the Energy Division of the steps it has taken to comply with this order." (2001 Cal. PUC LEXIS 846, ** 12-13, Ex. 8-9, emphasis added.)

On October 4, 2001, Edison sent a letter to the Commission's Energy Division, stating the steps Edison had taken to comply with D.01-09-060. In part, the letter stated that Edison electronically notified all active ESPs in its service territory that direct access had been suspended effective September 20. Edison also requested that ESPs provide Edison by September 24, 2001[4] with lists of customers that have been verified or that have executed contracts before September 20, but for whom the ESP had not yet submitted DASRs. Edison stated it had also given ESPs until October 5, 2001 to supplement this information.

Two other Commission decisions concerning direct access are relevant to the instant controversy. On October 10, 2001, the Commission issued D.01-10-036, which modified D.01-09-060 and denied rehearing as modified.

[4] Edison extended the September 24 date to October 5 by subsequent e-mail.

(See 2001 Cal. PUC LEXIS 957, Ex. 10.) The University of California and California State University (UC/CSU) sought clarification on whether the prohibition of any new contracts for direct access after September 20, 2001 allows or requires utilities to refuse to process DASRs for an account under a pre-September 21 contract. Specifically, UC/CSU entered into a contract with an ESP in 1998 for direct access service, and under the terms of that contract, all existing and new UC/CSU accounts were eligible to be on direct access service.

In D.01-10-036, the Commission reaffirmed that, unless the Commission stated otherwise, utilities were required to process DASRs relating to contracts executed on or before September 20, 2001, including DASRs for service to new facilities or accounts if the underlying contract pursuant to which those DASRs were submitted allowed the provision of that additional service. Thus, with respect to the UC/CSU contract described above, the Commission held that the utilities were required to accept, even after September 20, 2001, any DASRs they received that legitimately related to that contract.

The Commission also clarified that, unless directed or allowed in a subsequent Commission decision, utilities cannot set a deadline after which they could refuse to process DASRs relating to contracts executed on or before September 20, 2001. However, the Commission also confirmed its directive in D.01-09-060 that the utilities were to institute appropriate measures to make sure that they only accepted DASRs for contracts executed on or by September 20:

> "However, we note that our clarifications today regarding the requirements for accepting DASRs should not be interpreted in any way to diminish or restrict the utilities' obligations, that we ordered in D.01-09-060, to take appropriate measures to ensure that any DASRs they do accept are for contracts executed or agreements entered into on or before September 20, 2001. We expect ESPs and other entities to

> cooperate with the utilities in their verification activities."
> (2001 Cal. PUC LEXIS 957 **37-38, Ex. 10-21, emphasis added.)

The order to suspend direct access was not self-executing and would have to be implemented by additional procedures. The Commission convened a November 7, 2001 prehearing conference to discuss implementation, and the presiding Administrative Law Judge (ALJ) requested the utilities propose implementation measures. Edison, together with PG&E and SDG&E, filed a joint proposal on November 16, 2001 and interested parties were provided an opportunity to file comments and replies. (See D.02-03-055, 2002 Cal. PUC LEXIS 195 ** 23-34. Ex. 14-19.)

On January 14, 2002, the Commission issued Rulemaking (R.) 02-01-011[5] regarding the implementation of the suspension of direct access pursuant to AB 1X and D.01-09-060. The scope of this rulemaking was to examine implementation issues concerning direct access including: (1) whether the Commission should suspend direct access after September 20, 2001, or (2) whether it should make the effective date of the suspension of direct access July 1, 2001 or some other date, and (3) how the utilities should process DASRs. This rulemaking took official notice of the relevant pleadings above filed in Application (A.) 98-07-003 et al., and Ordering Paragraph 3 of R.02-01-011 required that the order instituting rulemaking be serve on all registered ESPs. Notice of the issuance of this rulemaking was posted on the Commission's

[5] Pursuant to Rule 73 of the Commission's Rules of Practice and Procedure, we take official notice of the order instituting rulemaking in R.02-01-011, which is a public document of the Commission filed in an official Commission proceeding.

January 11, 2002 Daily Calendar. A copy of the Commission's Daily Calendar was posted contemporaneously on the Commission's website.

On March 21, 2002, in R.02-01-011, the Commission issued D.02-03-055, 2002 Cal. PUC LEXIS 195, Ex. 14. In this decision, the Commission set forth eleven rules for the suspension of direct access. The first rule is as follows:

> "ESPs shall have provided by October 5, 2001 a list of names of all customers with direct access contracts in place as of September 20, 2001." (2002 Cal. PUC LEXIS 195 *26, Ex. 14-21.)

In adopting this rule, the Commission gave ESPs until November 1, 2001, to submit account specific details on the lists provided by October 5. The Commission reasoned that the "October 5 date for customer names, and the November 1 date for account specific details are fair – they are based on what ESPs said they could meet, and each utility notified ESPs in advance in writing that failure to submit names and account specific details as of the deadlines would lead to later DASR rejection." (*Id.*)

The Commission also adopted a process for human error where additions to the list would be permitted for customers who were not on the October 5 and November 1 lists who had a valid direct access contract and for additional sites for customers already on the lists. In this case, an independent third party would submit a DASR verification to the utility, together with an affidavit signed by both the ESP and the customer stating under penalty of perjury that the contract date is correct. (D.02-03-055, 2002 Cal PUC LEXIS 195 *27, Ex. 14-21.)

IV. Utilisource's History of Providing Direct Access Service

Utilisource's predecessor, Eastern Pacific Energy Inc. (Eastern Pacific) registered as an ESP with the Commission in 1997. (Eastern Pacific changed its name to Utilisource in February 2000.) It executed Energy Service Provider

Agreement No. 1029 with Edison on December 10, 1997. Section 2.1 of that agreement provides that "each party represents that it is and shall remain in compliance with all applicable laws and tariffs, including applicable CPUC requirements."

During parts of 1997 to 1999, Eastern Pacific provided direct access service to customers in Edison's service territory. On September 15, 1998, Edison returned all of Eastern Pacific's direct access customers to Edison bundled service and cancelled all pending DASRs for the ESP because of Eastern Pacific's failure to maintain a scheduling coordinator. A scheduling coordinator, licensed by the Independent System Operator, schedules the loads and resources on California's transmission system. Tariff Rule 22, Section B.3.C required that ESPs maintain a scheduling coordinator. Eastern Pacific attempted to start up again, but on August 31, 1999, its customers were again returned to bundled service for failure to maintain a scheduling coordinator.[6]

Between August 1999 and June 2000, Eastern Pacific/Utilisource and Edison exchanged numerous emails and letters. In these communications, Utilisource stated its general desire to start up again and return its customers to direct access. However, the ESP did not accomplish this desire. Eastern Pacific and later Utilisource served no direct access customers in Edison's service territory after September 1999. The only written communication Edison received

[6] It remains a question whether, given these breaches, the ESP contract with Edison was still valid.

from Utilisource between June 2000 and October 2002 was a change of phone number notification in June 2001.[7]

On May 29, 2001, the Commission, through its Energy Division, suspended Utilisource's ESP registration due to Utilisource's failure to extend its bond coverage. On November 2, 2001, Utilisource sent a letter to ESP Registration in the Energy Division requesting that its ESP bond be returned to the issuer. Utilisource stated that "Utilisource has not served any customers for over a year and a half. If we decide in the future to serve customers, we will reinstate our bond at that time."

V. Discussion

A. Jurisdiction

At the outset, we address Utilisource's contention that this controversy should be heard in the first instance by the Superior Court in which Utilisource initially filed its lawsuit against Edison.

Pub. Util. Code § 1759 provides that no state court, except the Supreme Court and court of appeal in specified circumstances, has jurisdiction to review, reverse, correct or annul any order or decision of the Commission, or to interfere with the Commission in the performance of its official duties.

Edison's Tariff Rule 22 governs issues relating to ESPs providing direct access service to customers in Edison's service territories. Since Utilisource is an ESP participating in direct access, it is bound by Tariff Rule 22.

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[7] The letter was addressed to ESP Services at Edison and stated "Dear ESP Services: Please be advised that effective immediately we have changed our telephone numbers." It then set forth the new telephone numbers and also stated that the address remained the same. The letter was signed, "Sincerely, Utilisource."

Tariff Rule 22.B.17.c provides in pertinent part as follows:

> "The CPUC shall have initial jurisdiction to interpret, add, delete or modify any provision of this tariff or the ESP Service Agreement, and to resolve disputes regarding SCE's [Edison's] performance of its obligations under SCE's tariffs, the ESP Service Agreement and requirements related to Direct Access service, including any disputes regarding delays in the implementation of Direct Access. (emphasis added.)"

This complaint alleges that Edison failed to meet Commission-imposed requirements related to direct access service. As such, Tariff Rule 22 requires Utilisource initially to bring its claim before the Commission. We therefore have jurisdiction to resolve this complaint.

The Superior Court agrees with this outcome. The court sustained Edison's demurrer to the Superior Court complaint with leave to amend, stating that the Commission had the initial jurisdiction to resolve this dispute pursuant to Tariff Rule 22.B.17.c, and giving Utilisource 16 months to exhaust its administrative remedies at the Commission. Utilisource then brought the instant complaint.

Utilisource argues that this matter should be heard in the Superior Court in the first instance, because it is ultimately seeking money damages and is entitled to a jury trial. However, the Commission has the jurisdiction to review the circumstances surrounding direct access and interpret its own decisions. Once the Commission does so, Utilisource can seek damages in Superior Court, if appropriate.

B. Utilisource's Obligations As An ESP

Utilisource's claim is that Edison was required to notify Utilisource of the October 5 and November 1, 2001 deadlines as a condition precedent to denying Utilisource's request to provide direct access service to affected customers for

failure to provide a timely customer list. We disagree with Utilisource's premise. As explained below, Utilisource had an obligation to comply with applicable laws, tariffs, and Commission requirements, which it did not do. Utilisource failed to comply with the October 5 and November 1, 2001 deadlines, and it failed timely to appeal, seek an extension, or request modification of the orders imposing those deadlines. We therefore deny Utilisource's complaint.

Utilisource's Energy Service Provider Agreement with Edison provides that Utilisource must "remain in compliance with all applicable laws and tariffs, including applicable CPUC requirements."[8] (See also D.99-05-034, 86 CPUC2d 467, 487-488.) Utilisource's Chief Executive Officer James Lezie acknowledged that Utilisource is "required to be aware of the decisions and rules of the CPUC [Commission]."[9] As part of this obligation, and in order to comply with Commission decisions, Utilisource is required to inform itself of applicable Commission decisions and proceedings that may impact its business. It is not reasonable for Utilisource to rely on Edison to perform this function for Utilisource.

Lezie stated that he reviewed D.01-09-060 and D.01-10-036 within a week of their issuance. Thus, shortly after the issuance of D.01-09-060 (which occurred on September 20, 2001), Utilisource was actually aware that the Commission suspended direct access after September 20, 2001. Utilisource was also aware that the Commission directed the utilities to take steps to ensure compliance with

[8] See Edison's Energy Service Provider Agreement No. 1029 with Utilisource, Section 2.1. This agreement is attached to the complaint.

[9] Transcript (Tr.) 177:20-22.

the order, and proposed that such steps might include obtaining from each ESP a list of relevant identifying information for those customers that had entered into timely contracts, but for whom DASRs had not been submitted.

D.01-09-060 articulated the urgent reasons for suspending direct access, and the need for quickly achieving finality on the extent of outstanding direct access contracts. As noted by the Commission shortly after that decision:

> "We … fully explained in D.01-09-060 the need to suspend direct access after September 20, 2001. We discussed the 'unprecedented debt incurred by the State to help weather the energy crisis,' and how repayment of the State's General Fund would be accomplished through the issuance of DWR [Department of Water Resources] Power Supply Revenue bonds at investment grade.' (D.01-09-060, pp. 6-8.) We explained how suspending the right to acquire direct access service after September 20, 2001, was necessary to assist the Administration and the State Treasurer in proceeding with the bond transaction that they were currently undertaking, and would assist and ensure these bonds would issue at investment grade. We discussed how the bonds would provide DWR with a stable customer base that was necessary to recover the costs of the power it has purchased and to continue purchasing power for retail customers. (D.01-09-060, p. 8.) In addition, we rejected the argument that the emergency no longer existed. (D.01-09-060, p. 7.) Given these considerations, we determined that 'it was not in the public interest for the Commission to delay action to suspend direct access service beyond this time.' (D.01-09-060, p.8.)" D.01-10-036, 2001 Cal. PUC LEXIS 957 **10-11, Ex. 10-7.)[10]

[10] The Commission modified D.01-09-060 to include this explanation (which was originally included in the text) also in the findings of fact. See D.01-10-036, 2001 Cal. PUC LEXIS 957 **11, 40; Ex. 10-8, 10-23.

However, during September and October 2001, Utilisource did not contact Edison or the Commission to seek clarification on how the suspension of direct access would affect the ESP, nor did it participate in ongoing Commission proceedings concerning the suspension ordered in D.01-09-060. Its only communication during this approximate timeframe came after September and October 2001, specifically a November 2 letter from Utilisource to the Energy Division, where Utilisource requested that the Energy Division return its bond to the issuer. According to the letter, "Utilisource has not served any customers for over one year and one half. If we decide in the future to serve customers, we will reinstate our bond at that time." Rather than actively staying informed of all applicable laws, regulations, and Commission proceedings that may impact its business, during this period Utilisource gave every indication that its business was inactive.

On January 9, 2002, the Commission issued R.02-01-011, regarding the implementation of the suspension of direct access pursuant to AB 1X and D.01-09-060. This rulemaking was noticed on Friday, January 11, 2002, in the Commission's Daily Calendar, a public document, which was also available on the Commission's website. Ordering Paragraph 3 required the Commission's Executive Director to serve the order instituting rulemaking on, *inter alia*, all registered ESPs. The order instituting rulemaking gave notice that the proceeding was to determine the implementation of the suspension of direct access pursuant to D.01-09-060, including the effect to be given contracts or agreements entered into on or before September 20, 2001. The rulemaking was to consider, among other things, whether to adopt a verification process to ensure that the DASR was for a contract entered into prior to the suspension date.

Based on this public notice and the ESP's obligations as discussed above, Utilisource was charged with notice that the Commission was developing rules for the implementation of direct access suspension, including but not limited to a suggestion in D.01-09-060 that the utilities obtain from each ESP a list of relevant identifying information for those customers that had entered into timely contracts, but for whom DASRs had not been submitted. However, Utilisource did not participate in R.02-01-011. Had Utilisource monitored and participated in relevant Commission proceedings concerning direct access, it could have offered its position on the reasonableness of the October 5 and November 1, 2001 deadlines in a timely fashion, before they were ratified by the Commission in D.02-03-055 on March 22, 2002. This decision, among other things, adopted rules implementing the suspension of direct access, including the requirement that ESPs provide a list of names of all customers with direct access contracts in place as of September 20, 2001, by October 5, and provide specific details for the list by November 1, 2001. The Commission reasoned that the dates were fair, because (1) they were based upon what ESPs said they could meet, and (2) each utility had notified ESPs in advance in writing that failure to submit names and account specific details as of the deadlines would lead to later DASR rejection. (See D.02-03-055, 2002 Cal. PUC LEXIS 195 *26, Ex. 14-21.)

Lezie stated that he first received official notification that Utilisource needed to provide the October 5 and November 1, 2001 lists from reading D.02-03-055. Lezie could not recall if he had reviewed D.02-03-055 within a week after its issuance, but stated he read it shortly after its issuance.[11]

[11] Tr. pp. 188-190.

Utilisource had the duty to stay informed of relevant Commission decisions. Moreover, prior to D.02-03-055's issuance but after November 1, 2001, Lezie stated that he had heard of the October 5 and November 1 deadlines.

> "Well, this was the first notice from a decision, from an official decision. We had - - before this time we had heard through other sources, but unfortunately, after the time that was set up by the utilities to provide a list we had heard about that, and then this came out, and it essentially adopted those dates." (Tr. pp. 192:26-28; 193:1-5.)

Thus, Utilisource had actual notice of the October 5 and November 1, 2001 deadlines prior to the issuance of D.02-03-055. When Utilisource learned about the October 5 and November 1 deadlines, prior to the issuance of D.02-03-055, it failed to seek information from the Commission or Edison. Even after the issuance of D.02-03-055, Utilisource did not attempt to file a timely application for rehearing.[12] Thus, this action is an impermissible collateral attack on D.02-03-055.

Utilisource might also have challenged D.02-03-055 by petitioning for modification under Pub. Util. Code § 1708 and Rule 47 of the Commission's Rules of Practice and Procedure. A petition for modification must be presented within one year of the effective date of the decision sought to be modified. (See Rule 47(d).) If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has

[12] An application for rehearing of D.02-03-055 would have had to be filed within 10 days after the decision's date of issuance. (See Pub. Util. Code § 1731 (c).) In most other cases, the time limit is 30 days after the decision's issuance. (See Pub. Util. Code § 1731(b).) Utilisource did not attempt to comply with either deadline.

not been justified, it may summarily deny the petition. Utilisource has never filed a petition to modify D.02-03-055.

Morever, any future such petition by Utilisource should be barred by laches because, as Utilisource was aware, it was important to achieve prompt, final rules on the status of direct access, including achieving finality on the extent of outstanding direct access contracts. Establishing a list of customers eligible for direct access (i.e., a list of names of all customers with direct access contracts in place by September 20, 2001) was suggested as an implementation step in D.01-09-060 to ensure a stable customer base for which the California Department of Water Resources (DWR) would purchase power. Such a list of the pool of customers eligible for direct access would provide certainty to all those managing the energy crisis, and would prevent later disputes concerning eligibility. Utilisource had knowledge of the importance for achieving finality of the lists not only through Commission decisions such as D.01-09-060, but also because the Legislature reduced the rehearing period of decisions such as D.02-03-055 from 30 to 10 days. (Pub. Util. Code § 1731(c).)

We also deny the complaint on an additional ground with respect to residential and small commercial customers. The version of Pub. Util. Code § 394(a) in effect on September 20, 2001[13] required Utilisource to register with the Commission in order to provide electrical service to residential and small commercial customers. (See also D.98-03-072, 79 CPUC2d 239, 259-260.) The

[13] As of December 2003, Utilisource needed to be a registered ESP to serve agricultural, and medium and large commercial customers, as well as residential and small commercial customers. (See D.03-12-015, 2000 Cal. PUC LEXIS 1153, implementing AB 117.)

Commission suspended Utilisource's registration on May 29, 2001, and Utilisource never repaired that suspension. Thus, Utilisource would not have been eligible to serve residential and small commercial customers after May 29, 2001 (i.e., on September 20, 2001), and also would not have been eligible to submit the October 5 and November 1, lists for these customers.

Rule 2 in D.02-03-055 further supports this outcome, and further defines which ESPs may submit to the utilities the lists required to be submitted by October 5, and November 1, 2001:

> "To submit an ESP list, or to submit DASRs for its accounts, an ESP must (1) have in effect a valid ESP/UDC service agreement as of September 20, 2001; and (2) ESPs serving small customers [i.e. residential and small commercial customers] must have in effect as of September 20, 2001 valid commission registration as required by law." (D.02-03-055, 2002 Cal. PUC LEXIS *28, Ex. 14-22.)

Because Utilisource's registration was suspended on September 20, 2001, Utilisource did not have in effect as of September 20, 2001 valid Commission registration as required by law. Pursuant to Rule 2 quoted above, Utilisource was not eligible to submit the October 5 and November 1, 2001 lists to the utilities for residential and small commercial customers.

Finally, it is not clear the extent, if any, that Utilisource seeks to provide electric power to customers who had direct access on or before September 20, 2001, but who became bundled customers on or before September 20, 2001. Utilisource would be prohibited from serving these customers, because such service would require a new contract which is prohibited by D.01-09-060. D.02-03-055 established that no exception is warranted in this situation. (See D.02-03-055, 2002 Cal. PUC LEXIS *33, Ex. 14-26.)

In sum, Utilisource has not demonstrated any basis why we should excuse its failure to comply with all applicable laws, tariffs, and Commission requirements. Utilisource failed to comply with the October 5 and November 1, 2001 deadlines. We therefore deny Utilisource's complaint.

C. Utilisource's Allegations

Utilisource argues that Edison had an obligation under D.02-03-055 to notify all ESPs of the October 5 and November 1, 2001 deadlines and that Edison's failure to do so has deprived Utilisource of due process if it is not allowed to serve the affected customers under its direct access agreements with them. Although Edison returned Utilisource's customers to bundled service and cancelled all pending DASRs because of Eastern Pacific's failure to maintain a scheduling coordinator on September 15, 1998, and again on August 31, 1999, Utilisource exchanged multiple telephone calls and emails with Edison after that time until June 2000. Utilisource believes that by this communication, Edison had notice that Utilisource intended to serve customers in the near future, and for this reason as well should have notified Utilisource of the above deadlines.

However, D.02-03-055 did not order Edison to notify all ESPs of these deadlines. D.02-03-055 stated that the utilities had notified ESPs of the deadlines, and on that as well as other grounds found the deadlines reasonable.

We now recognize that Edison did not notify Utilisource of the October 5 and November 1 deadlines, and that the Commission's adoption of these deadlines occurred in March 2002, after the deadlines had passed. However, the fact that Utilisource did not receive notice of the deadlines until after they had passed does not provide a basis for relieving it from the deadlines here, because Utilisource failed to comply with its independent obligation to comply with all applicable laws, tariffs, and Commission requirements, including staying

informed of relevant Commission proceedings. Utilisource could have timely challenged the reasonableness of the October 5 and November 1 deadlines, or timely sought extension or modification of them, but failed to do so; therefore, we reject Utilisource's due process argument as an impermissible collateral attack on D.02-03-055.

Utilisource also argues that it should be permitted to submit its list to Edison as provided by D.02-03-055 under the clerical error exception. We disagree. D.02-03-055 established a procedure for ESPs to add to the October 5 and November 1, 2001, lists on the basis of clerical error (i.e., if the ESP inadvertently omitted several names on the list). We did not intend the clerical exception to circumvent the entire rule that ESPs submit their lists by October 5 and November 1, 2001; such circumvention would preclude the desired finality. A stable customer base for which DWR would purchase power would provide the necessary certainty to all those managing the energy crisis, and would prevent later disputes concerning direct access eligibility.

Utilisource also argues that it sought and received a September 30, 2002 legal opinion from the Commission on the status of the business relationships between Utilisource and its previous small commercial customers with respect to direct access that this opinion did not mention the necessity of providing a list. However, Utilisource did not establish that it sought this legal opinion before the special 10-day rehearing period of D.02-03-055 had expired. Furthermore, the September 30, 2002 opinion does not purport to address or mention facts relevant to the issue of Utilisource's failure to meet the October 5 and November 1, 2001 deadlines. The opinion also states that it is an informal opinion of the Commission's Legal Division staff; such an opinion is not binding on the

Commission, which only issues binding determinations in formal proceedings. (See Ex. 13.)

Utilisource also argues that it can provide electric power to the affected customers because it satisfies Rule 2 in D.02-03-055. As stated above, Utilisource has not satisfied Rule 2 with respect to residential and small commercial customers. With respect to its other customers, Utilisource must also meet the requirement of Rule 1, that is, it must have met the October 5 and November 1, 2001 deadlines, which it did not do.

Because the parties focused on the issues addressed in the above decision, they did not fully explore other issues that we would need to address if Utilisource were somehow relieved of the requirement to submit a timely list to Edison. These issues include but are not limited to:

- The dates Utilisource signed each customer contract and whether the contracts are still valid;
- How many, if any, of these contracts concern customers who had direct access on or prior to September 20, 2001, but who became bundled customers on or before September 20, 2001, because Utilisource is barred from serving these customers as discussed above;
- How many, if any, of these contracts concern residential and small commercial customers, because at all relevant times Utilisource was required to be registered with the Commission to provide service to these customers, and is thus barred from serving these customers after May 29, 2001, as discussed above.

Because Utilisource would have been required to be a registered ESP to serve agricultural, and medium and large commercial customers after December 2003 pursuant to D.03-12-015, 2000 Cal PUC LEXIS 1153, we would

need to consider the impact of Utilisource's non-registration in that context as well.

In sum, Utilisource's legal theories do not sustain its complaint.

VI. Appeal of Presiding Officer's Decision

On March 11, 2005, Utilisource timely filed an appeal of the Presiding Officer's Decision (POD) alleging factual and legal errors. Based on the alleged errors, Utilisource argues that the POD's outcome should be reversed, and that Utilisource should be granted the relief sought in its complaint. Edison filed a timely response opposing Utilisource's appeal and supporting the POD.

Utilisource's appeal, for the most part, raises the same arguments it has made throughout the case. The POD addresses these arguments, and that discussion need not be repeated here. We affirm the POD, but make several minor changes to improve the discussion and correct typographical errors. We also make the following observations on the points Utilisource raises.

Utilisource argues that it did not breach its obligations to comply with all applicable laws, tariffs and Commission regulations, and that Edison failed to comply with Commission decisions. The essence of Utilisource's argument is that no Commission decision issued prior to the October 5 and November 1 deadlines gave notice to Utilisource of these deadlines, and it was Edison's obligation to inform Utilisource of these deadlines. Utilisource does not believe that it had any obligation to stay informed of Commission decisions or proceedings that may impact its business. Sections V.B and C address these arguments.

Even assuming that Utilisource's conduct prior to the issuance of the D.02-03-055 comports with its legal obligations (which we find it does not[14]), Utilisource nonetheless failed to timely challenge the October 5 and November 1 deadlines adopted in D.02-03-055. Utilisource admits that it received notice of the deadlines before March 2002 when D.02-03-055 issued, and that it received notice of D.02-03-055 shortly after it issued. Utilisource could have timely challenged the reasonableness of the October 5 and November 1 deadlines, or timely sought extension or modification of them, but failed to do so. As stated in the POD, Utilisource's action now is an impermissible collateral attack on D.02-03-055.

Utilisource argues that the POD's findings that Utilisource failed to comply with its obligations set forth in its Energy Service Provider Agreement with Edison is unsupported by the record, because Edison did not make this specific contention. We disagree. Utilisource's relationship with Edison is governed by its Energy Service Provider Agreement, and this agreement is in the record. The decision makes its findings and conclusions in this regard as a matter of law, based on the facts set forth in the evidentiary hearings. Its findings and conclusions are thus within the record of this proceeding.

Utilisource also argues that the Commission did not adjudicate Utilisource's position that Edison failed to comply with D.02-03-055, and therefore that Edison must be estopped from enforcing the deadlines imposed by D.02-03-055 on Utilisource. However, Section V.C addresses Utilisource's

[14] See Sections V.B and C.

argument, and finds that D.02-03-055 did not order Edison to notify the ESPs of the deadlines.

Utilisource also states as undisputed "that Utilisource had 2,649 contracts in existence prior to September 20, 2001… ." This statement is inaccurate. Edison disputed the validity of Utilisource's contracts, and Utilisource only submitted four of them into the record. The POD does not adjudicate the validity of these four contracts because it was not necessary to reach that issue, but serious questions remain as to their validity. Section V.C sets forth further issues that the parties would need to address to determine the validity of any outstanding contracts if Utilisource were somehow relieved of the requirement to submit a timely list to Edison. The mere assertion by Utilisource (on page 28 of the appeal) that it is "confident" it has 2,649 valid contracts clearly is inadequate as a basis on which to determine that they are valid.

Finally, Utilisource argues that the POD is in error because it failed to address Edison's offer to put Utilisource's customers on direct access. However, Edison did not make such an offer. In its post-hearing brief, Edison assumed for the sake of argument that the Commission agreed with Utilisource, and then stated that the most the Commission could award Utilisource was relief from the fall 2001 deadlines, and not monetary damages. This was an alternative argument, and not a concession or an offer by Edison to relieve Utilisource from the October 5 and November 1, 2001 deadlines.

VII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janet A. Econome is the Presiding Officer in this case.

Findings of Fact

1. Eastern Pacific registered as an ESP with the Commission in 1997. It executed Energy Service Provider Agreement No. 1029 with Edison on December 10, 1997. Section 2.1 of that agreement provides that "each party represents that it is and shall remain in compliance with all applicable laws and tariffs, including applicable CPUC requirements."

2. During parts of 1997 to 1999, Eastern Pacific provided direct access service to customers in Edison's service territory. On September 15, 1998, Edison returned all of Eastern Pacific's direct access customers to Edison bundled service and cancelled all pending DASRs for the ESP because of its violation of Tariff Rule 22 (failure to maintain a scheduling coordinator).

3. Eastern Pacific attempted to start up again, but on August 31, 1999, its customers were again returned to bundled service for failure to maintain a scheduling coordinator.

4. Between August 1999 and June 2000, Eastern Pacific (which changed its name to Utilisource in February 2000) and Edison exchanged numerous emails and letters. In these communications, Utilisource stated its general desire to start up again and return its customers to direct access. However, the ESP did not accomplish this desire.

5. Eastern Pacific and later Utilisource served no direct access customers in Edison's service territory after September 1999. The only written communication Edison received from Utilisource between June 2000 and October 2002 was a change of phone number notification in June 2001.

6. On May 29, 2001, the Commission, through its Energy Division, suspended Utilisource's ESP registration due to Utilisource's failure to extend its bond coverage. On November 2, 2001, Utilisource sent a letter to the ESP Registration

in the Commission's Energy Division, requesting that its ESP bond be returned to the issuer. The letter stated that "Utilisource has not served any customers for over a year and a half. If we decide in the future to serve customers, we will reinstate our bond at that time."

7. Utilisource reviewed D.01-09-060 and D.01-10-036 within a week of their issuance.

8. During September and October, 2001, Utilisource did not contact Edison or the Commission to seek clarification on how the suspension of direct access would affect the ESP, nor did it participate in or monitor ongoing Commission proceedings concerning the suspension. During this period, Utilisource gave every indication that its business was inactive.

9. As of January 9, 2002, Utilisource was charged with notice that the Commission was determining the implementation of direct access in R.02-01-011, including but not limited to a suggestion in D.01-09-060 that the utilities obtain from each ESP a list of relevant identifying information for those customers that have entered into timely contracts, but for whom DASRs had not been submitted.

10. Utilisource did not participate in R.02-01-011. Had Utilisource monitored and participated in relevant Commission proceedings concerning direct access, it could have offered its position on the reasonableness of the October 5 and November 1, 2001 dates in a timely fashion, before they were ratified by the Commission in D.02-03-055 on March 22, 2002.

11. D.02-03-055, among other things, adopted rules implementing the suspension of direct access, including the requirement that ESPs provide a list of names of all customers with direct access contracts in place as of September 20, 2001 by October 5, and provide specific details for the list by November 1, 2001.

The Commission reasoned that the dates were fair because (1) they were based upon what ESPs said they could meet, and (2) each utility had notified ESPs in advance in writing that failure to submit names and account specific details as of the deadlines would lead to later DASR rejection.

12. Utilisource had heard of the October 5 and November 1, 2001 deadlines after they had passed but prior to the issuance of D.02-03-055. Utilisource reviewed D.02-03-055 shortly after its issuance.

13. When Utilisource learned about the October 5 and November 1, 2001, deadlines, prior to the issuance of D.02-03-055, it failed to seek information from the Commission or Edison. Even after the issuance of D.02-03-055, Utilisource did not attempt to file a timely application for rehearing or petition for modification.

14. Utilisource's registration was suspended on May 29, 2001, and Utilsource never repaired the suspension. Thus, Utilisource would not have been eligible to serve residential and small commercial customers after May 29, 2001 (i.e., on or September 20, 2001), and was also not eligible to submit the October 5 and November 1, 2001 lists to the utilities for these residential and small commercial customers.

15. Utilisource is prohibited from serving customers who had direct access on or prior to September 20, 2001, but who became bundled customers on or before September 20, 2001, because such service would require a new contract which is prohibited by D.01-09-060.

16. The Superior Court sustained Edison's demurrer to the Superior Court complaint with leave to amend, stating that the Commission had the initial jurisdiction to resolve this dispute pursuant to Tariff Rule 22.B.17.c.

Conclusions of Law

1. Tariff Rule 22.B.17.c requires Utilisource initially to bring this claim before the Commission, rather than the Superior Court, and the Superior Court agrees with this outcome in this case.

2. As an ESP, Utilisource has an obligation to comply with all applicable laws, tariffs and Commission requirements. As part of this obligation, and in order to comply with Commission decisions, Utilisource is required to inform itself of applicable Commission decisions and proceedings that may impact its business.

3. This action is an impermissible collateral attack on D.02-03-055, pursuant to Pub. Util. Code § 1709 .

4. Utilisource had notice that it was important to achieve finality on the rules implementing direct access, including the extent of the outstanding direct access contracts, not only through Commission decisions such as D.01-09-060, but also because the Legislature reduced the rehearing period of decisions such as D.02-03-055 from 30 to 10 days, pursuant to Pub. Util. Code § 1731(c).

5. Any future challenge by Utilisource to the propriety of the October 5 and November 1, 2001 dates by a petition for modification is barred by laches.

6. Utilisource's requested relief in this complaint should be denied.

7. This decision should be effective immediately in order to resolve uncertainty regarding direct access contracts.

O R D E R

IT IS ORDERED that:

1. The relief requested by the May 10, 2004 complaint filed by Utilisource, fka Eastern Pacific Energy, Inc. a California Corporation is denied.
2. Case 04-05-014 is closed.

This order is effective today.

Dated June 16, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners